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IN THE

Supreme Court of the United States

PHILADELPHIA CHURCH OF GOD, INC.,

Petitioner,

v.

WORLDWIDE CHURCH OF GOD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the "right to hoard" a work requires the denial of a "fair use" defense when the copyright holder seeks to prevent dissemination at no charge and for religious and educational purposes of a previously published work, not to protect the work's future value, but to suppress views the copyright holder now abhors?

2. Whether the receipt of a "benefit" or "advantage" of any kind from the use of a copyrighted work prevents a "fair use" finding under the first statutory factor, even when the use is noncommercial?

3. Whether "fair use" is limited to uses that are transformative and for a different purpose from that of the original work?

4. Whether a work designed to critique and discredit an original work can be found to compete in the same market as the original work for purposes of the fourth statutory "fair use" factor?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Philadelphia Church of God, Inc. is an Oklahoma not-for-profit corporation with its principal place of business in Edmond, Oklahoma. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	vii
Opinions Below	1
Statement Of Jurisdiction	1
Statutory Provisions Involved	1
Statement	2
Reasons for Granting the Writ	10
I. This Court Should Grant Certiorari Because The Court Of Appeals' Holding That The "Right To Hoard" Requires Denial Of A "Fair Use" Defense Even When A Copyright Holder Seeks To Suppress A Work Rather Than To Exploit It Conflicts With Relevant Decisions Of This Court And The Court Of Appeals For The Second Circuit	13

Contents

Page

II. This Court Should Grant Certiorari Because The Court Of Appeals Applied Important Elements Of The "Fair Use" Doctrine In A Manner That Conflicts With Relevant Decisions Of This Court And The Court Of Appeals For The Second Circuit 16

A. The Ninth Circuit's Holding That Any "Benefit" Or "Advantage" From A Secondary Use Equates With "Profit" Under The First Fair Use Factor Conflicts With Holdings Of This Court And The Second Circuit 16

B. The Ninth Circuit's Rule That "Fair Use" Requires "Transformed" Or "Different" Use Resurrects Its *Sony* Opinion Twenty Years Ago That Was Reversed By This Court 19

C. The Ninth Circuit's Ruling That A Derivative Work Designed To Critique And Discredit An Original Work Competes In The Same "Market" As The Original Work For Purposes Of The Fourth Statutory Factor Conflicts With Holdings Of This Court And The Second Circuit 22

Conclusion 27

TABLE OF CITED AUTHORITIES

Page

Cases:

American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995) 12, 13, 18, 25, 26

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) ..... *passim*

Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) ..... *passim*

Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987) 10, 12, 13, 18, 25

New Era Publn's Int'l v. Carol Publ'g Group, 904 F.2d 152 (2d Cir. 1990) 25

Rosemont Enters. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) 11, 14, 16

Salinger v. Random House, Inc., 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987) 15

Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984) ..... *passim*

Stewart v. Abend, 495 U.S. 207 (1990) ..... *passim*

Cited Authorities

Page

Universal City Studios, Inc. v. Sony Corp. of Am., 659 F.2d 963 (9th Cir. 1981), *rev'd*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) 21

Wooley v. Maynard, 430 U.S. 705 (1977) 7

United States Constitution:

First Amendment 7, 15

Statutes:

17 U.S.C. § 107 ..... *passim*

28 U.S.C. § 1254(1) 1

42 U.S.C. §§ 2000bb *et seq.* 8

Rule:

Federal Rule of Civil Procedure 54(b) 1, 6

Other Authority:

Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105 (1990) 8, 17, 21, 23

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Ninth Circuit Dated And Filed September 18, 2000 ..... 1a

Appendix B — Judgment Of The United States District Court For The Central District Of California On Complaint Dated And Filed July 21, 1999 And Entered July 23, 1999 ..... 33a

Appendix C — Order And Judgment Of The United States District Court For The Central District Of California Denying Plaintiff's Motion For Partial Summary Judgment And Motion For Preliminary Injunction And Granting Defendant's Motion For Summary Adjudication Dated And Filed April 15, 1999 And Entered April 20, 1999 ..... 34a

Appendix D — Order Of The United States Court Of Appeals For The Ninth Circuit Denying Petition For Panel Rehearing And Suggestion For Rehearing En Banc Dated And Filed November 9, 2000 ..... 42a

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the consolidated appeals below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 227 F.3d 1110 (9th Cir. 2000) and appears in Appendix A. The district court's unreported separate judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure appears in Appendix B. The district court's unreported order granting summary judgment to petitioner appears in Appendix C.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 18, 2000 (Appendix A). The Court of Appeals denied a timely petition for rehearing and suggestion for rehearing en banc on November 9, 2000 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 107 of the Copyright Act of 1976, as amended, codified at 17 U.S.C. § 107, provides:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT

1. Herbert W. Armstrong in 1934 founded the Worldwide Church of God ("WCG"), based in Pasadena, California, which grew to over 90,000 members in 120 countries before his death in 1986. Proclaiming himself as the "chosen apostle" of Christ, and espousing an unorthodox blending of Christianity and Judaism, Armstrong was a prolific preacher of the gospel and author of religious texts. A year before he died, Armstrong wrote his last and most important work, *Mystery of the Ages* ("*MOA*"), which thoroughly explicated his views on religion and the Bible. He believed, and the

WCG taught, that *MOA* was a divinely inspired work, second in importance only to the Bible, that it should be distributed for free, and that it should reach the "largest audience possible."

What happened to the WCG after Armstrong's death has been described, by both independent religious observers and the WCG leaders who succeeded him, as unprecedented in the history of religion. Over a period of several years, the new church leadership proceeded to repudiate every major tenet of Armstrong's teachings and attempted to remake the WCG into a mainstream Christian church. So thorough was the WCG's repudiation of its founder that its new leadership ultimately labeled Armstrong's views as "heresy" and "unbiblical."

In 1988 the WCG ceased distributing *MOA* and ordered that all copies in church inventories throughout the world be destroyed. Although the WCG for a time considered revising the book, it later concluded that the errors were so pervasive that it could not be salvaged. Among the reasons for destroying copies of the work, WCG representatives stated, was "to prevent a moral transgression of conscience by proclaiming what the WCG might consider to be ecclesiastical error." The WCG's current head wrote of *MOA* in 1997:

> We feel it is *our Christian duty to keep this book out of print* . . . because we believe Mr. Armstrong's doctrinal errors are better left out of circulation. (Emphasis added.)

The rejection by new church leadership of the very doctrines that had attracted a large following had a predictable effect on the church's members, who defected in staggering numbers. WCG membership dropped by more than 75,000 between 1988 and 1997, and more than a third of its ministers left the church.

2. One of the splinter churches formed by defecting WCG ministers was the Philadelphia Church of God ("PCG"), which was founded in Edmond, Oklahoma in 1989. The PCG's members are among the strictest followers of Armstrong's teachings and beliefs. As the WCG did during Armstrong's life, the PCG considers *MOA* to be a divinely inspired work. Prospective members must read *MOA* before they may even attend a church service, and they must show a thorough understanding of the book before they may be baptized. As the WCG also previously taught and believed, the PCG feels under a religious duty to disseminate Armstrong's message as part of the Biblical command to "feed the flock" and teach the world "as a witness."

From 1989 to 1996, the PCG endeavored to pursue its religious mission by relying on printed copies of *MOA* that could be located in used book stores or elsewhere. When the available supply of pre-existing copies of *MOA* dwindled far below the demand of its existing and prospective members, however, the PCG in January 1997 began to print and distribute free-of-charge duplicate copies of *MOA*, as Armstrong himself authored it. By early 1999, the PCG had distributed free copies to nearly 30,000 people who requested it, at a cost of over a quarter of a million dollars.

3. The WCG filed an action for copyright infringement in U.S. District Court for the Central District of California in February 1997. In its answer, the PCG asserted among other things that its distribution of *MOA* was a statutorily-protected "fair use" under 17 U.S.C. § 107. The PCG also asserted a counterclaim seeking a declaration that it had the right to distribute *MOA* as well as certain other works by Armstrong that were central to its religious beliefs.

The parties later filed cross-motions for summary judgment on the WCG's complaint, and the WCG filed a

motion for preliminary injunction. On April 20, 1999, the district court entered an order granting the PCG's motion and denying the WCG's motions. *See* Appendix C.

The district court first found that the PCG's distribution of *MOA* was a "fair use" under 17 U.S.C. § 107. With respect to the "purpose and character of the use" under the first statutory factor, *id.* § 107(1), the district court found it undisputed that PCG used *MOA* for "non-profit religious and educational purposes." Appendix C at 38a. PCG provides the work "free of charge and unconditionally," "does not send solicitations for tithes or other donations along with requested copies of *MOA*," and does not "follow up with later solicitations." *Id.* at 37a. With respect to the "amount and substantiality of the portion used" under the third statutory factor, 17 U.S.C. § 107(3), the district court held that, "[b]ecause the PCG continues to regard MOA as a religious work that must be used as a complete text, the amount of text copied by the PCG is reasonable in relation to that use." Appendix C at 39a.

With respect to the "effect of the use upon the potential market for or value of the copyrighted work" under the fourth statutory factor, 17 U.S.C. § 107(4), the district court found "no evidence that the PCG's distribution of MOA has caused any cognizable harm to the WCG." Appendix C at 39a. It noted that "the WCG has no plans to print or use MOA as originally written." *Id.* at 37a. After the PCG asserted a fair use defense in 1997, the WCG for the first time raised the possibility of publishing an "annotated" version of *MOA* that would describe its doctrinal errors. The district court noted that the WCG had made no arrangements to have such a book written and held that the "version of MOA distributed by the PCG and the WCG's proposed 'annotated' MOA would not in any sense 'compete' in the same market." *Id.* at 37-39a. The district court also found that a fair use finding was supported by "other equitable factors, including MOA's

publication as a religious work and the WCG's attempts to prevent further publication or distribution of MOA." *Id.* at 39a.

Alternatively, the district court held that the WCG did not own the copyright to *MOA* in any event, because it was not a work-for-hire. Citing evidence of his complete power to control every aspect of the WCG's affairs, the district court held that Armstrong himself, not the WCG, "had the right to control the manner and means by which the writing of MOA was accomplished." *Id.* at 38a. It further found that Armstrong did not write *MOA* in the course of an employment relationship with WCG. *Id.*

On July 23, 1999, the district court entered judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure for the PCG on the WCG's complaint.[1] *See* Appendix B.

4. The Ninth Circuit reversed in a split decision.

a. The panel majority held that summary judgment should be granted for the WCG on liability, that the case should be remanded for a trial on damages alone, and that an injunction should issue forbidding the PCG's further distribution of *MOA*.

It first held that, as a matter of law and without need for further factfinding on remand, the PCG's distribution of *MOA* was not a fair use. It rejected the PCG's contention that the WCG's efforts to suppress *MOA* for reasons unrelated to exploiting its future value violated the purposes of the copyright laws. Because it considered *MOA* to be an expressive work, Appendix A at 15-16a, the panel majority

---

1. Although final judgment was entered on the WCG's complaint, the PCG's counterclaim, which seeks declaratory relief concerning several other Armstrong works, remained.

held that this was "not a case of 'abuse of the copyright owner's monopoly as an instrument to suppress *facts*.' " *Id.* at 10a (emphasis added) (quoting *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985)). Further, First Amendment considerations were not offended here, it held, because freedom of expression recognizes not only the right to speak but to refrain from speaking. *Id.* (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Finally, it relied on the dictum from *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990), that " 'nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.' " Appendix at 10-11a.

On the first statutory fair use factor, the "purpose and character of the use," 17 U.S.C. § 107(1), the panel majority found it critical that the PCG's use of the work was not "transformative," *i.e.*, the PCG did not add to or modify *MOA*. Appendix A at 13-14a. Furthermore, although the work was not distributed for "profit" in the traditional sense, the panel majority found that the first factor nonetheless weighed against fair use, because the PCG " 'profited' " by gaining "an 'advantage' or 'benefit' from its distribution and use of *MOA* without having to account to the copyright holder." *Id.* at 15a. The second statutory factor, the "nature of the copyrighted work," 17 U.S.C. § 107(2), weighed against fair use, the panel majority held, because it found *MOA* to be more creative and expressive than informational. Appendix A at 15-16a.

On the third statutory factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," 17 U.S.C. § 107(3), the panel majority acknowledged that the amount of copying should be judged in relation to the religious uses for which PCG distributed the work. It nonetheless found the copying

excessive here, because the PCG used the work for the same purposes as those for which the WCG originally used it. Appendix A at 17a.

The panel majority then found the fourth statutory use factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), to be, "at worst, neutral." Appendix A at 21a. The panel majority suggested that the value of the WCG's purported plans to publish an annotated version of *MOA* might be impaired by PCG's distribution of the original work, because both sought adherents in "the Christian community." *Id.* at 18-19a. Even if the two works did not compete in the same market, however, the panel majority held that the PCG's use would still be impermissible, because the PCG "has unfairly appropriated *MOA* in its entirety for the very purposes for which WCG created *MOA*." *Id.* at 20a. Relying on a law review article by Judge Leval, the panel majority held that lack of harm to market value does not require a finding of fair use in the absence of justification under the first factor. *Id.* at 20-21a (quoting Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1124 (1990)).

The panel majority did not reach the district court's conclusion that *MOA* was not a "work-for-hire," because it found that the WCG acquired ownership of the copyright by bequest through Armstrong's will. Statements by Armstrong and his successors that Armstrong wrote the work as a "last will and testament, to be passed on to those who would value it," the panel majority held, did not create a triable issue that he granted others a license to use the work, and the existence of such a license was not properly raised as an affirmative defense.[2] *Id.* at 7a.

2. The district court had dismissed the PCG's claims and defenses under the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* The Ninth Circuit affirmed that dismissal in a ruling that is not raised in this petition.

b. The dissent would have affirmed the district court's entry of judgment for the PCG on the basis of its fair use defense.

On the first statutory factor, the dissent found the PCG's use noncommercial based on the undisputed facts that it "copied and distributed *MOA* free of charge to spread a religious message," did so because it "was out of print and difficult to obtain through normal channels," and "did not solicit any funds in connection with its distribution of *MOA*." *Id.* at 27a. Any unsolicited donations it received did not come close to covering the costs of distribution, which costs the WCG itself had cited in justifying discontinuing the work. *Id.* at 28a. That the use was not "transformative" was irrelevant to the dissent, because changing what PCG believed was a "divinely inspired text" would "defeat PCG's religious purpose." *Id.* That *MOA* had been out of print for many years was an additional factor supporting a finding of fair use. *Id.* (citing, *inter alia*, *Harper & Row*, 471 U.S. at 553).

The second and third statutory factors, the dissent thought, were "mostly irrelevant." *Id.* It found that *MOA* "defies easy classification . . . as either informational or creative." *Id.* at 28-29a. Quoting this Court's holding in *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 449-50 (1984), the dissent said that " 'even wholesale copying does not weigh against a finding of fair use under the third factor if it is consistent with the noncommercial purpose and character of the use.' " Appendix A at 29a.

Under the "fourth and most important statutory factor," the dissent found that the PCG's use did not impair the value or marketability of *MOA* to the WCG. *Id.* at 29-30a. "WCG's decision to cease publication of *MOA*, destroy inventory copies, and disavow *MOA*'s religious message in the context

of its doctrinal shift as a church demonstrates that *MOA* is no longer of value to WCG . . . ." *Id.* at 30a. Nor did WCG show any meaningful likelihood of future harm to a proposed annotated version. WCG "made no reasonable effort to create an annotated version of *MOA* in the decade following its decision to cease publication," and its stated "Christian duty" to keep *MOA* out-of-print "undermine[s] the credibility of WCG's intention to publish any such annotation." *Id.* at 30-31a. Moreover, even if an annotation were published, "the functions served by *MOA* and the proposed annotation as well as their potential markets are different." *Id.* at 31a (citing *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987)). Indeed, if anything, PCG's use "creates a larger potential market for an annotation rather than interfering with it." *Id.*

Because "WCG appears less interested in protecting its rights to exploit *MOA* than in suppressing Armstrong's ideas which now run counter to church doctrine," the dissent concluded that "prohibition of PCG's noncommercial, religious use 'would merely inhibit access to ideas without any countervailing benefit.' " *Id.* at 32a (quoting *Sony Corp.*, 464 U.S. at 450).

c. The PCG's petition for rehearing and suggestion for rehearing en banc was denied on November 9, 2000.

REASONS FOR GRANTING THE WRIT

This Court has held that the fair use doctrine is an " 'equitable rule of reason,' " *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 448 (1984), which calls for "case-by-case analysis," not "rigid application" or "bright-line rules," *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994). Here, the Ninth Circuit held that it is not fair

use for a church to distribute without charge the "core text essential to its members' religious observance," for the purpose of "religious practice and education," where the successor to the copyright, a religious organization with diametrically opposed views, has decided the work should be suppressed as "ecclesiastical error." The Ninth Circuit reached this remarkable result through a rigid, erroneous, and inequitable interpretation of the Copyright Act in general, and the fair use statute, 17 U.S.C. § 107, in particular, that is inconsistent with prior decisions of this Court and of the Second Circuit Court of Appeals.

The Ninth Circuit's ruling rests on a fundamental misconception of the "right to hoard" a work, which properly construed addresses only the right of a copyright holder to withhold a license, not the right of unauthorized parties to make "fair use" of the work. Whether a use is "fair" turns primarily on whether it would adversely affect the author's ability to exploit the work and thereby would reduce the rewards for artistic creation. When the copyright holder's only interest adversely affected by the use of a previously published work is not that in protecting its future value, but in suppressing the dissemination of views the copyright holder now abhors, the interests of copyright are not served by deeming the use "unfair."

The Ninth Circuit's extension of the "right to hoard" into a "right to suppress" rests on an overly broad reading of language from *Stewart v. Abend*, 495 U.S. 207, 228-29 (1990), and an unduly narrow reading of this Court's condemnation of suppression in *Harper & Row, Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985). Because its holding also presents a square conflict with the Second Circuit's decision in *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), this Court should definitively resolve this important issue of copyright law.

Proceeding from its false understanding of the nature of the "right to hoard," the Ninth Circuit then constructed a Procrustean bed into which it attempted to squeeze settled "fair use" doctrines. Any one of the errors that resulted from the Ninth Circuit's tortured application of these doctrines would independently warrant review by this Court. Taken together, however, they create a particularly compelling case for certiorari.

First, the Ninth Circuit disregarded the obviously noncommercial nature of the PCG's use by holding that any "benefit" or "advantage" a secondary user receives, even a noncommercial one, makes a "fair use" defense unavailable. This holding violates this Court's ruling in *Campbell v. Acuff-Rose*, *supra*, and creates a conflict with at least two Second Circuit decisions, *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), and *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995).

Second, the Ninth Circuit held that any use that is not "transformative" or that is for the same purpose for which the original work was used cannot be "fair use." Not only does this fail to recognize that nontransformative uses may serve the interests of copyright when the copyright holder is suppressing the original work; more significantly, this ruling resurrects the same "productive use" requirement that this Court repudiated in *Sony Corp. v. Universal City Studios, Inc.*, *supra*, when it reversed the Ninth Circuit's decision in that case some twenty years ago.

Finally, the Ninth Circuit discounted the overriding importance of the fourth statutory "fair use" factor, the effect on the market value of the work, contrary to Supreme Court precedent. It also purported to find an adverse effect on the WCG's hypothesized future marketing of an "annotated" version of *MOA*, whose sole purpose would be to critique

and discredit the original work. That an original work does not compete in the same "market" as works critical of it is well-settled, not only in *Campbell v. Acuff-Rose*, *supra*, but in a line of Second Circuit cases including *Maxtone-Graham v. Burtchaell*, *supra*, and *American Geophysical Union v. Texaco Inc.*, *supra*. One way the law distinguishes between protecting legitimate copyright interests and forbidding illegitimate suppression is by carefully evaluating the extent to which a copyrighted work and works critical of it "compete" under the fourth fair use factor. The confusion resulting from the fundamental conflict between the Second and Ninth Circuits on this important issue should be resolved by this Court to ensure that the purposes of copyright are furthered and not thwarted.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS' HOLDING THAT THE "RIGHT TO HOARD" REQUIRES DENIAL OF A "FAIR USE" DEFENSE EVEN WHEN A COPYRIGHT HOLDER SEEKS TO SUPPRESS A WORK RATHER THAN TO EXPLOIT IT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE SECOND CIRCUIT

Fundamentally, the Ninth Circuit's analysis turned on its conclusion that the Copyright Act grants a copyright owner an unqualified "right to hoard" a work. Appendix A at 10-11a. The Ninth Circuit purported to take its lead from this Court's statement in *Stewart v. Abend*, 495 U.S. 207 (1990), that "nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright." *Id.* at 228-29.

While *Stewart* recognizes that a copyright holder generally may refuse to authorize use of the copyrighted work for any reason, that is irrelevant to the question whether

unauthorized use of the work is nevertheless "fair use" under the Copyright Act. Indeed, in *Stewart* itself, after concluding that the successor copyright holder had the right to refuse to authorize use of a work — that is, to "hoard" it — the Court separately analyzed whether the unauthorized use was nevertheless "fair use." *Id.* at 236-38. Moreover, in *Stewart*, this Court emphasized that the copyright holder apparently "want[ed] to profit from the distribution of the work" and did not "seek[ ] suppression of it." *Id.* at 228. The "right to hoard" recognized in *Stewart* thus does not compel courts applying "fair use" analysis to assume that the interests of copyright are served by permitting a copyright holder to suppress the dissemination of a previously published work for reasons unrelated to protecting the work's future value.

The Ninth Circuit's unwarranted extension of *Stewart* places that court in square conflict with the Second Circuit, which has held that the right to "hoard" a copyrighted work does not permit a copyright holder to suppress information or ideas. In *Rosemont Enters. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967), a Howard-Hughes-controlled corporation purchased copyrights to magazine articles to foil the planned publication of an unflattering Hughes biography. The panel majority rejected Hughes's infringement claim because:

> The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate any attempted interference with the public's right to be informed regarding matters of public interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

Id. at 311 (Lumbard & Hays, JJ., concurring).[3]

3. The Second Circuit subsequently held that J.D. Salinger could block publication of a biography that quoted his private letters, (Cont'd)

Where the owner uses a copyright not to protect the value of a work's future use but to keep hated ideas out of circulation, the purposes of the copyright laws are offended. This Court has never "sanction[ed] abuse of the copyright owner's monopoly as an instrument to suppress facts." *Harper & Row*, 471 U.S. at 559. The Ninth Circuit tried to distinguish *Harper & Row* on the ground that the WCG is not using the copyright monopoly to " 'suppress facts,' " because *MOA* supposedly is more expressive than factual. Appendix A at 10-11a, 15-16a. " 'The public interest in the free flow of information,' " the Ninth Circuit noted, " 'is assured by the law's refusal to recognize a valid copyright in facts.' " *Id.* at 10a (quoting *Harper & Row*, 471 U.S. at 558).

Harper & Row does not hold, however, that the inability to copyright facts, as opposed to expression, is the only way copyright protects First Amendment interests. To the contrary, *Harper & Row* expressly stated that First Amendment protections are also found in the "latitude" provided by the fair use doctrine. 471 U.S. at 560. Given this Court's command that copyright must promote "broad public availability of literature, music, and the other arts," *Sony Corp.*, 464 U.S. at 432 (quotation omitted), the holding that First Amendment concerns favoring a finding of "fair use" arise from the suppression only of facts, not of religious works, is both dubious and alarming.

(Cont'd)
though the critical fact that his letters were unpublished makes that case inapposite. *Salinger v. Random House, Inc.*, 811 F.2d 90, 96, 100 (2d Cir.) ("we place special emphasis on the unpublished nature of Salinger's letters"; describing pre-1992 version of 17 U.S.C. § 107 as according a "narrower scope of fair use . . . for unpublished works"), *cert. denied*, 484 U.S. 890 (1987); *accord Harper & Row*, 471 U.S. at 564 ("The fact that a work is unpublished is a critical element of its 'nature.' ").

In short, this Court should grant certiorari to curtail the Ninth Circuit's unwarranted extension of the "right to hoard" announced in *Stewart v. Abend*; to resolve the Ninth Circuit's conflict with the Second Circuit in *Rosemont Enterprises*; and to correct the Ninth Circuit's erroneous reading of *Harper & Row* to permit suppression of religious works that are not (except to believers) strictly factual.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS APPLIED IMPORTANT ELEMENTS OF THE "FAIR USE" DOCTRINE IN A MANNER THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND THE COURT OF APPEALS FOR THE SECOND CIRCUIT

A. The Ninth Circuit's Holding That Any "Benefit" Or "Advantage" From A Secondary Use Equates With "Profit" Under The First Fair Use Factor Conflicts With Holdings Of This Court And The Second Circuit

The first fair use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The Ninth Circuit conceded that PCG's purpose in using *MOA* is not commercial, but "to serve religious practice and education." Appendix A at 14a. The court then created a presumption, however, that all secondary uses of a copyrighted work are for "profit" and therefore "unfair," unless the secondary user derives no benefit of any kind from the use.

The Ninth Circuit quoted this Court to the effect that " '[t]he crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the

user stands to profit from exploitation of the copyrighted material without paying the customary price.' " *Id.* (quoting *Harper & Row*, 471 U.S. at 562). The Ninth Circuit then held that "*MOA*'s use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of *MOA* new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth." *Id.* at 15a. Thus, according to the Ninth Circuit, "[i]t is beyond dispute that PCG 'profited' from copying *MOA* — it gained an 'advantage' or 'benefit' from its distribution and use of *MOA* without having to account to the copyright holder." *Id.*

The Ninth Circuit gave dispositive weight to this conclusion, holding that without " 'justification under the first factor . . . there can be no fair use.' " Appendix A at 20-21a (quoting Leval, *Toward a Fair Use Standard*, 103 Harv. L. Rev. 1105, 1124 (1990)). Thus, according to the Ninth Circuit, any use that "benefits" the secondary user constitutes "profit," any profit negates "justification" under the first factor, and lack of justification under the first factor precludes a finding of fair use.

This presumption created by the Ninth Circuit is inconsistent with this Court's decision in *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994). There, the Court rejected the notion that " 'every commercial use of copyrighted material is presumptively . . . unfair' " or that "the commercial character of a use bars a finding of fairness." *Id.* at 584 (quoting *Sony Corp.*, 464 U.S. at 451). This Court emphasized that, "[i]f, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative [fair] uses listed in the preamble paragraph of Section 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.' " *Id.* (quoting *Harper & Row*, 471 U.S. at 592).

The Ninth Circuit's rule also conflicts with the decisions of the Second Circuit in *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), and *American Geophysical Union v. Texaco Inc.*, 60 F.3d 913 (2d Cir. 1994), *cert. dismissed*, 516 U.S. 1005 (1995). In *Maxtone-Graham*, the defendant published a book about abortion that contained very substantial direct quotations from the plaintiff's copyrighted work. 803 F.2d at 1256-57. It was undisputed that the defendant was "paid for his efforts and that his publishers were not motivated by purely charitable intentions." *Id.* at 1262. But the Second Circuit held that "[plaintiff's] suggestion that any income-producing use is unfair virtually by definition falls wide of the mark" and that, were there such a presumption, "fair use would be virtually obliterated." *Id.* In *American Geophysical*, the Second Circuit cited this Court's decision in *Campbell* in rejecting any "presumption against fair use arising from commercial use." 60 F.3d at 921.

The presumption created by the Ninth Circuit sweeps even more broadly than the one rejected by this Court in *Campbell* and by the Second Circuit in *American Geophysical* and *Maxtone-Graham*. Under the Ninth Circuit's rule, even a use that had no commercial aspect whatsoever would be presumptively unfair if it benefited the secondary user in any way, monetary or otherwise. News reporters whose careers were advanced (and salaries potentially increased), critics whose reviews became more widely disseminated, professors who attracted students or gained tenure, and researchers who garnered funding for their further investigations would all be found to have "profited" from their use of copyrighted material and therefore be deprived, without more, of a fair use defense. This Court should grant review to ensure that the Ninth Circuit's ruling does not threaten such results and thereby chill the very dissemination of ideas the Copyright Act was intended to encourage and protect.

B. The Ninth Circuit's Rule That "Fair Use" Requires "Transformed" Or "Different" Use Resurrects Its *Sony* Opinion Twenty Years Ago That Was Reversed By This Court

Central to the Ninth Circuit's fair use analysis was the fact that the PCG distributed *MOA* in its original form without modification for the same purposes that the WCG originally distributed the work. In addition to its reasoning just discussed on the first statutory fair use factor, the Ninth Circuit also found against the PCG on that factor because its use was not "transformative": PCG's verbatim reprinting of the book "bespeaks no 'intellectual labor and judgment,' " and it was " 'use[d] for the same intrinsic purpose as [the copyright holder's].' " Appendix A at 13-14a (citations omitted).

The Ninth Circuit repeated this reasoning in its analysis of the third statutory factor, "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The Ninth Circuit acknowledged this Court's holding in *Campbell* that " 'the extent of permissible copying varies with the purpose and character of the use.' " Appendix A at 16-17a (quoting *Campbell*, 510 U.S. at 586-87). Although the PCG's religious purposes are served only by using the entirety of the text, which the PCG considers (as the WCG once did) a divinely inspired work, the Ninth Circuit nonetheless found the amount of copying excessive, because "the purpose for which it uses the *MOA* is the same as WCG's." *Id.* at 17a.

The Ninth Circuit invoked this reasoning yet again on the fourth statutory factor, the effect on the market for or value of the work. 17 U.S.C. § 107(4). Whether the PCG's distribution of *MOA* would compete with any annotated version the WCG might someday publish, the Ninth Circuit

found, "misses the point. The fact remains that PCG has unfairly appropriated *MOA* in its entirety for the very purposes for which WCG created *MOA*." Appendix A at 20a.

The Ninth Circuit's rigid and pervasive focus on PCG's failure to "transform" *MOA* and on its use of the work for the "same intrinsic purpose" for which the WCG once used it (but no longer does) presents an issue that should be reviewed by this Court for several reasons. To begin with, it plainly violates this Court's admonition that "transformative use is not absolutely necessary for a finding of fair use." *Campbell*, 510 U.S. at 579.

More fundamentally, the Ninth Circuit's approach follows from its erroneous refusal to acknowledge that fair use analysis must take into account the fact that a user is distributing a work that is being suppressed by the copyright holder. In the normal case, allowing a nontransformative secondary use threatens copyright values by reducing returns the author would otherwise receive from exploiting the work without any corresponding addition to the storehouse of knowledge. *Id.* Where the owner seeks to suppress the work, however, a secondary use need not be transformative to further copyright values. Distributing the work in its original form adds to the storehouse of knowledge, by bringing the work to the attention of new readers; and it does not reduce creative incentives, because the secondary use undermines no future return on the original work. (This is doubly true here, because the creative act was by the author, who wanted his greatest work to reach the "largest audience possible," not the present owner, which simply inherited the copyright. Appendix A at 7a.)

Most disturbing, the Ninth Circuit's insistence that "fair use" means "transformed" or "different" use resurrects the "productive use" requirement from its very opinion in the *Sony* case twenty years ago that was reversed by this

Court. *See Universal City Studios, Inc. v. Sony Corp. of Am.*, 659 F.2d 963, 970 (9th Cir. 1981) ("[F]air use has traditionally involved what might be termed the 'productive use' of copyrighted material. . . . Fair use has not heretofore had to do with the mere reproduction of a work in order to use it for its intrinsic purpose — to make what might be called the 'ordinary' use of it."), *rev'd*, *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 455 n.40 (1984) (Ninth Circuit erroneously "assumed that the category of 'fair use' is rigidly circumscribed by a requirement that every such use must be 'productive.' . . . The distinction between 'productive' and 'unproductive' uses may be helpful in calibrating the balance, but it cannot be wholly determinative.").

The Ninth Circuit attempted to cloak its rejection of this Court's directive in that case by arguing that *Sony* involved "unique" facts: "copying of videotapes for time-shifting for personal use to 'enable[ ] a viewer to see such a work which he had been invited to witness in its entirety free of charge.' " Appendix A at 17a (quoting *Sony Corp.*, 464 U.S. at 449-50). No such factual distinction exists, however, because Mr. Armstrong and the WCG also distributed *MOA* entirely free of charge. More important, no legal distinction exists between the Ninth Circuit's rule here and the rule rejected by this Court in *Sony*. Indeed, although the Ninth Circuit was not so frank, the article by Judge Leval upon which the majority elsewhere relies, *id.* at 20-21a, admits that his proposed rule requiring that the "use must be productive and must employ the quoted matter in a different manner or for a different purpose from the original" was "rejected" by the *Sony* majority and finds support only in the *Sony* dissent. Leval, *supra*, at 1111 & n.29.

It is one thing for a judge to write in a law review article that the dissent in a Supreme Court decision was better reasoned than the majority opinion. It is quite another for a

Federal Court of Appeals to decide a case on that basis, particularly when it has once before announced the same rule and been directly reversed by this Court. This Court's supervisory responsibility to ensure compliance with its rulings dictates that certiorari be granted on this issue.

C. The Ninth Circuit's Ruling That A Derivative Work Designed To Critique And Discredit An Original Work Competes In The Same "Market" As The Original Work For Purposes Of The Fourth Statutory Factor Conflicts With Holdings Of This Court And The Second Circuit

The Ninth Circuit also applied the fourth statutory factor, "the effect of the use upon the potential market for or value of the copyrighted work," 17 U.S.C. § 107(4), in a manner at odds with decisions of this Court and the Second Circuit. The only effect on the "potential market" claimed by the WCG or identified by the Ninth Circuit was a possible effect on the market for an "annotated version" of *MOA* that the WCG claimed it might someday publish. As the dissent noted, WCG's stated purpose for this hypothetical work was "to identify Armstrong's historical, doctrinal, and social errors." Appendix A at 31a. Although the evidence showed that the WCG had taken no substantial steps to publish such a version, and the WCG first mentioned the possibility only after the PCG raised its fair use defense in this case, the Ninth Circuit credited the WCG's claim. Having done so, the court concluded that the fourth factor was "at worst [for WCG], neutral." *Id.* at 21a. This was fundamental error.

This Court has repeatedly held that "[t]he fourth factor is the most important, and indeed, central fair use factor." *Stewart v. Abend*, 495 U.S. 207, 238 (1990) (quotations omitted); *accord Harper & Row*, 471 U.S. at 566. This is true because, as this Court has stated, "a use that has no

demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit." *Sony Corp.*, 464 U.S. at 450-51. Accordingly,

> [a] challenge to a noncommercial use of a copyrighted work requires proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work. . . . What is necessary is a showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.

Id. at 451. In the absence of such a showing, the purpose of the Copyright Act is not served by prohibiting the secondary use, and the use accordingly cannot be "unfair."

The Ninth Circuit's conclusion that, even if there was no showing of market harm by the WCG, the fourth factor would be "at worst, neutral" is squarely at odds with this Court's decision in *Sony*. Under *Sony*, if there is no showing of harm to the market, there can virtually never be unfair use, for the simple reason that, in the absence of such harm, there is no disincentive to create copyrightable works. That is, the fourth factor cannot be "neutral": if there is no potential harm proven, that must weigh in favor of a finding of fair use; if potential harm is proven, that must weigh against a finding of fair use depending on the extent of market harm shown. Although Judge Leval argued in his law review article that lack of market harm should not support fair use in the absence of justification under the first factor, in a passage the Ninth Circuit quoted and relied upon, Appendix A at 20-21a, this states a view that he acknowledges fails to give full weight to the rulings of this Court. *See* Leval, *supra*, at 1124 (the "Supreme Court has somewhat overstated [the] importance" of the market-effect factor).

Moreover, even had the WCG shown some potential harm to the market for an "annotated version" demonstrating the ecclesiastical error of *MOA*, under this Court's decisions such harm would not support a finding against fair use. In *Campbell*, the Court addressed a fair use defense invoked by parodists of the song "Oh, Pretty Woman." The Court expressly rejected the notion that any harm to the market for parodies of "Oh, Pretty Woman" would support a finding against fair use under the fourth factor. As Justice Souter wrote for a unanimous Court, "the parody and the original usually serve different market functions":

> The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." S. Maugham, Of Human Bondage 241 (Penguin ed. 1992).

Campbell, 510 U.S. at 591-92. *See also Harper & Row*, 471 U.S. at 568 (fourth factor concerned with "use that supplants any part of the *normal* market for a copyrighted work") (emphasis added).

Sony and *Campbell* stand for the proposition that a secondary use is "unfair" only if allowing it, without compensation to the copyright holder, would inhibit the creation of new copyrightable works. Where the only claimed harm from the secondary use is to a market for a type of work that the creator of the original would not "in general develop or license others to develop," such as one critical of the original, allowing the use will not inhibit creation of new

works. Because the purposes of the Copyright Act would be undermined by prohibiting such a use, it should generally be considered a fair use. The Ninth Circuit's holding that the difference between the markets for the original work and for works critical of it "misses the point," Appendix A at 20a, is at odds with this fundamental principle.

The Ninth Circuit's ruling in this respect is also in conflict with interpretation of the fourth factor by the Second Circuit. As the dissent noted, the Second Circuit held in *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 481 U.S. 1059 (1987), that the "publication of a book opposing abortion which used quotations from an earlier book tending to view abortion in a favorable light did not economically harm the earlier work." Appendix A at 30a. This was true because " 'the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats.' " *Id.* at 31a (quoting *Maxtone-Graham*, 803 F.2d at 1264); *see also New Era Publn's Int'l v. Carol Publ'g Group*, 904 F.2d 152, 160 (2d Cir. 1990) (the fourth factor favored a finding of fair use because "the critique and the copyrighted work serve fundamentally different functions, by virtue of, among other things, their opposing viewpoints") (quotations omitted). Here, in contrast, the Ninth Circuit found a possible adverse market effect by the original *MOA* on an "annotated" version of that work, even though the two works take polar opposite viewpoints and serve entirely different functions.

Moreover, the Second Circuit in *American Geophysical, supra*, emphasized that "courts have found that the fourth factor will favor the secondary user when the only possible adverse effect occasioned by the secondary use would be to a potential market or value that the copyright holder has not typically sought to, or reasonably been able to, obtain or capture." 60 F.3d at 930. Accordingly, "[o]nly an impact on

potential licensing revenues for traditional, reasonable, or likely to be developed markets should be legally cognizable when evaluating a secondary use's effect upon the potential market for or value of the copyrighted work." *Id.* (quotations omitted). Here, the market for an "annotated" version of *MOA* showing how that work "offend[s] cultural standards of social sensitivity" and perpetuates "ecclesiastical error" is not a "traditional" or "reasonable" market that the creator of the original work is "likely to . . . develop[ ]." Indeed, the WCG has never marketed an "annotated" version, though Armstrong died in 1986, so such a market indisputably is one that the WCG has "not typically sought to, or reasonably been able to, obtain or capture."

The rule articulated by this Court in *Sony* and *Campbell*, and by the Second Circuit in the line of cases just discussed, is critical to identifying those uses that do and do not serve the interests of copyright. Insulating one work from harms resulting from distribution of a work that serves an entirely different function in a different market in no way serves the purpose of the Copyright Act to encourage creation and dissemination of ideas and creative works. An author creating a work will not refrain from doing so because he fears that, if his heirs later decide his ideas are "heresy" and withdraw the work from the market, they will be unable to stop others from publishing that work.

On the other hand, a finding that fair use is negated by harm to the market for potential works critical of the original gives the successor to the copyright a powerful weapon to suppress the creator's ideas, a result squarely contrary to the purposes of the Copyright Act. While anyone should be free to debate the validity of the creator's ideas, no one should have the power to suppress those ideas simply because he or she disagrees with them. As the dissent found, "[t]he prohibition of PCG's noncommercial, religious use

'would merely inhibit access to ideas without any countervailing benefit.' " Appendix A at 32a (quoting *Sony Corp.*, 464 U.S. at 450-51).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED SEPTEMBER 18, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 99-55850, 99-55934,
99-56005, 99-56489

D.C. No. CV-97-05306-JSL

WORLDWIDE CHURCH OF GOD,
a California Corporation,

Plaintiff-Counter-Defendant-Appellant,

v.

PHILADELPHIA CHURCH OF GOD, INC.,
an Oklahoma Corporation,

Defendant-Counter-Claimant-Appellee.

Appeal from the United States District Court
Central District of California
J. Spencer Letts, District Judge Presiding

Argued and Submitted
December 6, 1999 — Pasadena, California

Filed September 18, 2000

Appendix A

Before: Melvin Brunetti and A. Wallace Tashima, Circuit Judges, William W. Schwarzer,* Senior District Judge.

Opinion by Judge Schwarzer; Dissent by Judge Brunetti

* * *

OPINION

SCHWARZER, Senior District Judge:

Appellant Worldwide Church of God ("WCG") is a nonprofit religious organization whose late Pastor General, Herbert W. Armstrong, wrote a 380-page book entitled *Mystery of the Ages* ("*MOA*"), the copyright to which is held by WCG. After Armstrong's death, WCG retired *MOA* from distribution and use. Appellee Philadelphia Church of God ("PCG"), also a nonprofit religious organization, then appropriated *MOA* for use in its religious observance, copying it in its entirety and distributing large numbers of copies to its members and the public. We must decide whether PCG's copying and dissemination of *MOA* constitutes fair use under the Copyright Statute. 17 U.S.C. § 107.

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Appendix A

FACTUAL BACKGROUND

Herbert Armstrong founded the Radio Church of God, later renamed Worldwide Church of God, in 1934. He held the title of "Pastor General with the spiritual rank of Apostle" and was its undisputed spiritual and temporal leader until his death in 1986. Armstrong was a prolific writer, producing over three thousand articles for the church's magazine *The Plain Truth*, all of which were copyrighted in the name of WCG, or its affiliate teaching arm, Ambassador College.

Armstrong wrote *MOA*, his final work, between 1984 and 1985. He completed it when he was ninety-two years old, shortly before his death. He copyrighted it in the name of WCG and published it in serial form in *The Plain Truth* magazine, distributed free of charge to approximately eight million people. In addition, WCG distributed over 1.24 million copies free of charge to employees and to viewers of WCG telecasts. In all, WCG put over nine million free copies of *MOA* into circulation.

Two years after Armstrong's death, WCG decided to discontinue distribution of *MOA* for several reasons, including the fact that the Church's positions on various doctrines such as divorce, remarriage, and divine healing had changed. The Church hoped to "prevent a transgression of conscience by proclaiming what the Church considered to be ecclesiastical error" espoused in *MOA* and it considered that Armstrong, who was ninety-two when he wrote *MOA*, conveyed outdated views that were racist in nature. Its Advisory Council of Elders indicated that the Church stopped distributing *MOA* because of "cultural standards of social

sensitivity" and to avoid racial conflict. The Council noted, "Insensitivity in this area is contrary to the doctrinal program of WCG to promote racial healing and reconciliation among the races." WCG disposed of excess inventory copies of *MOA* and stopped distribution, but retained archival and research copies. WCG never sought to withdraw or destroy personal copies or copies held by public institutions or any public library, nor did it request that its members destroy their copies. WCG has indicated an interest in publishing an annotated *MOA* sometime in the future but has not yet begun work on it.

In 1989, two former WCG ministers, Gerald Flurry and John Amos, founded a new religious organization, PCG. The new church grew to over six thousand members by 1996 and claims strictly to follow the teachings of Herbert Armstrong. PCG asserts that *MOA* is central to its religious practice and required reading for all members hoping to be baptized into PCG. Until January 1997, PCG relied on existing copies of *MOA* but it then began copying *MOA* for its own use. It is undisputed that PCG never requested permission from WCG to print *MOA*. It is also undisputed that PCG copied *MOA* verbatim, deleting only WCG from the copyright page and substituting Herbert Armstrong in its place, and deleting a "Suggested Reading" page and a warning against reproduction without permission. PCG has distributed approximately thirty thousand copies of its *MOA* in English text, in addition to foreign-language versions. It has advertised its version in newspapers and periodicals and has received substantial contributions from persons who have received its *MOA*.

Appendix A

When PCG ignored WCG's demand that it cease infringing its copyright and continued distribution of its *MOA*, this action followed.

PROCEDURAL BACKGROUND

In its complaint, WCG alleged that PCG, by reproducing, distributing, promoting, advertising and offering unlawful and unauthorized copies of *MOA*, has been infringing WCG's copyright. PCG answered, denying WCG's ownership of the copyright and asserting that WCG's claim was barred by the Free Exercise Clause of the First Amendment, the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4, and the fair use doctrine, 17 U.S.C. § 107, and counterclaimed seeking a declaration of its right to reproduce and distribute *MOA*.[1]

WCG moved for partial summary judgment and for a preliminary injunction to restrain PCG from printing or distributing any materials copyrighted by WCG, including *MOA*. PCG filed a cross-motion for summary adjudication. The district court denied WCG's motions and granted PCG's motion for summary adjudication. It concluded that Armstrong was the author of *MOA* and that it was not a work for hire, implying that WCG did not own the copyright, and that PCG's use of *MOA* is statutorily protected "fair use" of the work under 17 U.S.C. § 107.

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1. The district court granted WCG's motion to strike the RFRA defense and counterclaim before reaching PCG's summary judgment motion. The RFRA issue is before us, therefore, only by way of the appeal from the final judgment.

WCG appeals the order granting summary judgment to PCG (No. 99-55934), the denial of its motion for a preliminary injunction (No. 99-55850), and the denial of its motion to amend the judgment (No. 99-56005). On June 30, 1999, this court granted the motions to consolidate these three appeals. On July 23, 1999, the district court entered judgment for PCG on WCG's complaint pursuant to Federal Rule of Civil Procedure 54(b). WCG filed a notice of appeal with respect to that judgment (No. 99-56489), and this court granted appellee's motion to consolidate that appeal as well. Because all of the district court's orders are merged into the final judgment, we have jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment *de novo*. *See Balint v. Carson City, Nevada*, 180 F.3d 1047, 1050 (9th Cir. 1999) (en banc).

DISCUSSION

I. OWNERSHIP OF THE COPYRIGHT

PCG disputes WCG's ownership of the *MOA* copyright, contending that Armstrong, not WCG, had the right to control *MOA*'s creation and that therefore WCG cannot claim either authorship or ownership of *MOA* through the "work-for-hire" doctrine under 17 U.S.C. § 201(b), and the district court so found. We need not address this hotly disputed issue, however, for it is undisputed that Armstrong, who owned the copyright, bequeathed his entire estate to WCG. His Will left all of his real and personal property to WCG. The Will was admitted to probate and was not challenged. The Superior Court entered an order of final distribution providing that "preliminary distribution having . . . been

made, . . . all other property belonging to said estate . . . be and is hereby distributed to Worldwide Church of God." Because the ownership of a copyright may, under 17 U.S.C. § 201(d), "be bequeathed by will," WCG is now the owner.

PCG responds that "Armstrong granted a nonexclusive, implied license for *MOA* to be disseminated by those who value its religious message." As a result, it argues, WCG took any copyright subject to this preexisting license. The existence of a license creates an affirmative defense to a claim of copyright infringement. *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996), citing *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 559 (9th Cir. 1990). PCG did not plead this defense in its answer (or otherwise raise it in the district court) as required by Federal Rule of Civil Procedure 8(c) ("In pleading to a preceding pleading, a party shall set forth affirmatively [the affirmative defense of] . . . license."). Accordingly, the issue is not properly before us. *See Magana v. Commonwealth of the N. Mariana Islands*, 107 F.3d 1436, 1446 (9th Cir. 1997). In any event, the argument is without merit. An implied license may be granted orally or be implied from conduct. *See Effects*, 908 F.2d at 558. PCG does not contend that Armstrong granted it a license, but only that he wished *MOA* to have the largest audience possible. It has offered no evidence that Armstrong created *MOA* for dissemination by third parties, much less that he intended to license PCG to reprint the entire book and use it for its own church. We conclude that Armstrong's copyright passed to WCG through his Will and that WCG is the owner of the copyright in *MOA*.

Appendix A

II. THE "FAIR USE" DEFENSE

A.

The district court concluded that the facts "support a finding that PCG's use of *MOA* is a statutorily protected 'fair use' of the work." In reaching this conclusion, it found that PCG uses *MOA* "for non-profit religious and educational purposes," that copying a complete religious text "is reasonable in relation to that use," that WCG presented no evidence that it lost members due to PCG's distribution, that a potential annotated *MOA* produced by WCG would not compete against PCG's copies of *MOA*, and that *MOA*'s being out of print provided additional justification for PCG's production of *MOA*. WCG contends that the district court's determination of "fair use" is factually and legally erroneous.

Fair use is a mixed question of law and fact. If there are no genuine issues of material fact, or if, even after resolving all issues in favor of the opposing party, a reasonable trier of fact can reach only one conclusion, a court may conclude as a matter of law whether the challenged use qualifies as a fair use of the copyrighted work. *See Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1150-51 (9th Cir. 1986). Where the record is sufficient to evaluate each of the statutory factors, "an appellate court 'need not remand for further fact-finding . . . [but] may conclude as a matter of law that the . . . use do[es] not qualify as a fair use of the copyrighted work.' " *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 560 (1985) (quoting *Pacific & S. Co. v. Duncan*, 744 F.2d 1490, 1495 (11th Cir. 1984)).

Appendix A

Under § 106 of the Copyright Act, WCG as the owner of the copyright has the exclusive right to reproduce and distribute copies of *MOA*. 17 U.S.C. § 106(1), (3). That right is not diminished or qualified by the fact that WCG is a not-for-profit organization and does not realize monetary benefit from the use of the copyrighted work. Nor is that right affected by the religious nature of its activity; Congress narrowly limited the privilege accorded religious uses to "performance of a . . . literary or musical work . . . or display of a work, in the course of services at a place of worship or other religious assembly." 17 U.S.C. § 110(3). PCG's unauthorized copying and distribution of *MOA* falls outside of that narrow exception to copyright protection. *See F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, 214 U.S.P.Q. 409, 411, 1982 WL 19198 (7th Cir.) ("F.E.L can prevent churches from copying or publishing its copyrighted works, even if the churches only intend to use the copies or publications at not-for-profit religious services. . . . Neither the religious element nor the non-profit element of a performance will protect illegal copying or publishing."). We have held that

> we must be careful not to deprive religious organizations of all recourse to the protections of civil law that are available to all others. Such a deprivation would raise its own serious problems under the Free Exercise Clause [citation omitted]. It would also leave religious organizations at the mercy of anyone who appropriated their property with an assertion of religious right to it.

Maktab Tarighe Oveyssi Shah Maghsoudi, Inc. v. Kianfar, 179 F.3d 1244, 1248 (9th Cir. 1999).

Nor do First Amendment free speech considerations support PCG's claim of fair use based on WCG's withdrawal of *MOA* from distribution.

> The public interest in the free flow of information is assured by the law's refusal to recognize a valid copyright in facts. The fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance.

Harper & Row, 471 U.S. at 558 (quoting *Iowa State Univ. Research Found., Inc. v. American Broad. Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)). "Moreover, freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all.' " *Id.* at 559 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)); *see also Salinger v. Random House, Inc.*, 811 F.2d 90, 100 (2d Cir. 1987) (holding that copyright owner has right to protect "the expressive content of his unpublished writings for the term of his copyright"). This is not a case of "abuse of the copyright owner's monopoly as an instrument to suppress facts." *Harper & Row*, 471 U.S. at 559. *Cf. Rosemont Enter., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966) (concurring opinion) (purchase by Howard Hughes of copyright on magazine articles to block publication of his biography). As the Supreme Court has explained:

> [A]lthough dissemination of creative works is a goal of the Copyright Act, the Act creates a balance between the artist's right to control the

> work during the term of the copyright protection and the public's need for access to creative works. The copyright term is limited so that the public will not be permanently deprived of the fruits of an artist's labors. [Citation omitted]. But nothing in the copyright statutes would prevent an author from hoarding all of his works during the term of the copyright.

Stewart v. Abend, 495 U.S. 207, 228-29 (1990).

B.

PCG seeks to defend its infringing activity as fair use under § 107 of the Copyright Act. That section provides in relevant part that "the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching . . ., scholarship or research, is not an infringement of copyright." 17 U.S.C. § 107. In determining whether the use made of a work in any particular case is a fair use, § 107 provides that the factors to be considered shall include:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

Appendix A

The common-law background of the fair use doctrine illuminates the consideration of the factors Congress incorporated into § 107. As the Supreme Court has explained:

> The statutory formulation of the defense of fair use in the Copyright Act reflects the intent of Congress to codify the common-law doctrine. . . . "[T]he author's consent to a reasonable use of his copyrighted works ha[d] always been implied by the courts as a necessary incident of the constitutional policy of promoting the progress of science and the useful arts, since a prohibition of such use would inhibit subsequent writers from attempting to improve upon prior works and thus . . . frustrate the very ends sought to be attained." [Ball, Law of Copyright and Literary Property 260 (1944)]. Professor Latman, in a study of the doctrine of fair use commissioned by Congress for the revision effort, see [*Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 462-463 n.9 (dissenting opinion)], summarized prior law as turning on the "importance of the material copied or performed from the point of view of the reasonable copyright owner. In other words, would the reasonable copyright owner have consented to the use?"

Harper & Row, 471 U.S. at 549-50.

The Court went on to observe that Justice Story gave early judicial recognition to the doctrine, quoting the following statement:

> [A] reviewer may fairly cite largely from the original work, if his design be really and truly to use the passages for the purposes of fair and reasonable criticism. On the other hand, it is as clear, that if he thus cites the most important parts of the work, with a view, not to criticise, but to supersede the use of the original work, and substitute the review for it, such a use will be deemed in law a piracy.

Id. at 550 (quoting *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C. Mass. 1841)).

C.

With this background in mind, we turn to consideration of the four statutory factors.

1. The first factor calls for consideration of "the purposes and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). "The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely 'supersede[s] the objects' of the original creation [citations omitted] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.' " *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). As Justice Story put it: "There must be real, substantial condensation of the materials, and intellectual labor and judgment bestowed thereon; and not

merely the facile use of the scissors; or extracts of the essential parts, constituting the chief value of the original work." *Folsom*, 9 F. Cas. at 345.

PCG's copying of WCG's *MOA* in its entirety bespeaks no "intellectual labor and judgment." It merely "supersedes the object" of the original *MOA*, to serve religious practice and education. Although "transformative use is not absolutely necessary for a finding of fair use," *Campbell*, 510 U.S. at 579, where the "use is for the same intrinsic purpose as [the copyright holder's] . . . such use seriously weakens a claimed fair use." *Weissmann v. Freeman*, 868 F.2d 1313, 1324 (2d Cir. 1989). Nevertheless, PCG argues that this factor favors fair use because its use is not commercial or for profit. The Supreme Court has cautioned that "the commercial or nonprofit educational purpose of a work is only one element of the first factor inquiry into its purpose and character." *Campbell*, 510 U.S. at 584. While the fact that a publication is commercial tends to weigh against fair use, the absence of a commercial use merely eliminates the presumption of unfairness. "[T]he mere fact that a use is educational and not for profit does not insulate it from a finding of infringement. . . ." *Id.*; *see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) ("Even copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have."); *Marcus v. Rowley*, 695 F.2d 1171, 1175 (9th Cir. 1983). "The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Harper & Row*, 471 U.S. at 562. We

agree with the Second Circuit that in weighing whether the purpose was for "profit," "[m]onetary gain is not the sole criterion . . . [p]articularly in [a] . . . setting [where] profit is ill-measured in dollars." *Weissmann*, 868 F.2d at 1324 (holding that a professor's verbatim copying of an academic work was not fair use, in part because "the profit/nonprofit distinction is context specific, not dollar dominated" and a professor can "profit" by gaining recognition among his peers and authorship credit). *See also* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971) 1811 (defining "profit" as "an advantage, [a] benefit").

Putting aside the disputed question whether PCG uses *MOA* to generate income, and having in mind that like academia, religion is generally regarded as "not dollar dominated," *MOA*'s use unquestionably profits PCG by providing it at no cost with the core text essential to its members' religious observance, by attracting through distribution of *MOA* new members who tithe ten percent of their income to PCG, and by enabling the ministry's growth. During the time of PCG's production and distribution of copies of *MOA* its membership grew to some seven thousand members. It is beyond dispute that PCG "profited" from copying *MOA* — it gained an "advantage" or "benefit" from its distribution and use of *MOA* without having to account to the copyright holder. The first factor weighs against fair use.

2. The second statutory factor, "the nature of the copyrighted work," turns on whether the work is informational or creative. *See Harper & Row*, 471 U.S. at 563 ("The law generally recognizes a greater need to disseminate factual

works than works of fiction or fantasy."); *see also Sony*, 464 U.S. at 455 n.40 ("Copying a news broadcast may have a stronger claim to fair use than copying a motion picture."); *Hustler*, 796 F.2d at 1153-54 ("The scope of fair use is greater when 'informational' as opposed to more 'creative' works are involved."). PCG's brief describes *MOA* as "primarily a textual, historical account of [Armstrong's] views of the 'the truth' of the Bible." While it may be viewed as "factual" by readers who share Armstrong's religious beliefs, the creativity, imagination and originality embodied in *MOA* tilt the scale against fair use. *See Dr. Seuss Enter., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1402 (9th Cir. 1997).

3. The third factor directs us to consider "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). PCG copied the entire *MOA* verbatim, deleting only the "Suggested Readings" and the reference to "Worldwide Church of God" from the copyright page. While "wholesale copying does not preclude fair use per se," copying an entire work "militates against a finding of fair use." *Hustler*, 796 F.2d at 1155. Moreover, "the fact that a substantial portion of the infringing work was copied verbatim is evidence of the qualitative value of the copied material, both to the originator and to the plagiarist who seeks to profit from marketing someone else's copyrighted expression." *Harper & Row*, 471 U.S. at 565.

PCG argues its verbatim copying of the whole work is reasonable because its use of *MOA* is religious in nature. "[T]he extent of permissible copying varies with the purpose

and character of the use." *Campbell*, 510 U.S. at 586-87. In *Campbell*, the Court held that "[c]opying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart." *Id.* at 588. PCG's copying stands on a different footing for the purpose for which it uses the *MOA* is the same as WCG's. This court has held "that a finding that the alleged infringers copied the material to use it for the same intrinsic purpose for which the copyright owner intended it to be used is strong indicia of no fair use." *Marcus*, 695 F.2d at 1175. Reliance on *Sony* would be misplaced. There, the Supreme Court held that reproduction of the entire work "[did] not have its ordinary effect of militating against a finding of fair use" under the unique circumstances of that case, to wit: copying of videotapes for time-shifting for personal use to "enable[ ] a viewer to see such a work which he had been invited to witness in its entirety free of charge." *Sony*, 464 U.S. at 449-50. No such circumstances exist here to justify PCG's reproduction of the entire work. PCG uses the *MOA* as a central element of its members' religious observance; a reasonable person would expect PCG to pay WCG for the right to copy and distribute *MOA* created by WCG with its resources. The third factor, therefore, weighs against fair use.

4. The fourth factor considers "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4). It has been said that "[f]air use, when properly applied, is limited to copying by others which does not materially impair the marketability of the work which is copied." *Harper & Row*, 471 U.S. at 566-67 (quoting Nimmer, Copyright § 1.10[D], at 1-87). This case presents a novel application of the fair use doctrine where the copyright

owner is a not-for-profit organization. As might be expected, published case law deals with works marketed for profit. However, it cannot be inferred from that fact that the absence of a conventional market for a work, the copyright to which is held by a nonprofit, effectively deprives the holder of copyright protection. If evidence of actual or potential monetary loss were required, copyrights held by nonprofits would be essentially worthless. Religious, educational and other public interest institutions would suffer if their publications invested with an institution's reputation and goodwill could be freely appropriated by anyone.

The statute by its terms is not limited to market effect but includes also "the effect of the use on the *value* of the copyrighted work." 17 U.S.C. § 107(4) (emphasis added). As *Sony* states, "[e]ven copying for noncommercial purposes may impair the copyright holder's ability to obtain the rewards that Congress intended him to have." *Sony*, 464 U.S. at 450. Those rewards need not be limited to monetary rewards; compensation may take a variety of forms. *Id.* at 447 n.28 ("The copyright law does not require a copyright owner to charge a fee for the use of his works. . . . It is not the role of the courts to tell copyright holders the best way for them to exploit their copyrights").

WCG points out that those who respond to PCG's ads are the same people who would be interested in WCG's planned annotated version or any future republication of the original version. With an annotated *MOA*, WCG hopes to reach out to those familiar with Armstrong's teachings and those in the broader Christian community. PCG's distribution of its unauthorized version of *MOA* thus harms WCG's

goodwill by diverting potential members and contributions from WCG. While the district court found that PCG's *MOA* and WCG's proposed annotated *MOA* "would not in any sense 'compete' in the same market," undisputed evidence shows that individuals who received copies of *MOA* from PCG are present or could be potential adherents of WCG. *MOA*'s value is as a marketing device; that is how PCG uses it and both PCG and WCG are engaged in evangelizing in the Christian community.

PCG argues that WCG's failure to exploit *MOA* for ten years and its lack of a concrete plan to publish a new version show that "*MOA* has no economic value to the WCG that the PCG's dissemination of the work would adversely affect." We disagree. Even an author who had disavowed any intention to publish his work during his lifetime was entitled to protection of his copyright, first, because the relevant consideration was the "potential market" and, second, because he has the right to change his mind. *See Salinger*, 811 F.2d at 99. WCG explained that it ceased distribution because the Church's position on various doctrines had changed, continued distribution would offend cultural standards of social sensitivity, and dissemination would perpetuate what the Church considered ecclesiastical error. For those reasons, WCG planned an annotated edition of *MOA*.[2]

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2. Because the Church plans at some time to publish an annotated version of *MOA*, it is entitled to protection of its copyright. This is not a case of market failure, as PCG contends, for the very reason stated in the article on which it relies:

> When an owner refuses to license because he is concerned that defendant's work will substitute for his

(Cont'd)

Finally, PCG argues that if WCG published an annotated version it would be so different as not to be competitive with PCG's *MOA*. The argument, aside from being speculative, misses the point. The fact remains that PCG has unfairly appropriated *MOA* in its entirety for the very purposes for which WCG created *MOA*. We have found no published case holding that fair use protected the verbatim copying, without criticism, of a written work in its entirety. As the 1967 House Report notes, the market factor "must almost always be judged in conjunction with the other three criteria." H.R. REP. No. 83, at 35 (1967). Judge Pierre N. Leval has written:

> When the secondary use does substantially interfere with the market for the copyrighted work, as was the case in [*Harper & Row*], this factor powerfully opposes a finding of fair use. But the inverse does not follow. The fact that the secondary use does not harm the market for the original gives no assurance that the secondary use is justified. Thus, notwithstanding the importance of the market

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(Cont'd)

> own work or derivative works, the owner is representing not only his own interest, but also the interest of his potential customers and thus the public interest. Market failure should be found only when the defendant can prove that the copyright owner would refuse to license out of a desire unrelated to the goals of copyright — notably a desire to keep certain information from the public.

Wendy Gordon, *Fair Use As Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 Colum. L. Rev. 1600, 1634 (1982).

> factor, especially when the market is impaired by the secondary use, it should not overshadow the requirement of justification under the first factor, without which there can be no fair use.

Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1124 (1990).

On balance, the defense of fair use of *MOA* fails. The first three factors weigh in WCG's favor and the fourth factor is, at worst, neutral.

III. PCG's DEFENSE UNDER THE RELIGIOUS FREEDOM RESTORATION ACT

PCG contends that the judgment should be affirmed on the independent ground of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4. RFRA provides in relevant part that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability [subject to exceptions not relevant here]." 42 U.S.C. § 2000bb-1(a). RFRA "essentially requires the government to justify any regulation imposing a substantial burden on the free exercise of religion by showing that the regulation satisfies strict scrutiny." *Goehring v. Brophy*, 94 F.3d 1294, 1298 n.4 (9th Cir. 1996). PCG contends that the relief requested by WCG would substantially burden a central tenet of its religious doctrine, namely, distribution of *MOA* to current and potential adherents of its church. It also considers *MOA* to play an important role in its daily religious practice. The district court dismissed PCG's claim and affirmative defense under RFRA.

Appendix A

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA exceeded the authority of Congress under Section 5 of the Fourteenth Amendment to enforce the First Amendment. We have held, along with most other courts, that the Supreme Court invalidated RFRA only as applied to state and local law. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 832 (9th Cir. 1999). We will continue to assume, without deciding, that RFRA is constitutional as applied to federal law. *See id.* at 833-34. Courts have interpreted RFRA as an amendment of existing federal statutes and thus a constitutional exercise of Congressional authority. In *In re Young*, 141 F.3d 854 (8th Cir. 1998), the court found RFRA amended the bankruptcy code, precluding the bankruptcy trustee from avoiding a debtor's tithes to his church. *Id.* at 861. *See also EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C. Cir. 1996) (holding, pre-*Boerne*, that RFRA precluded application of Title VII to plaintiff whose position was the functional equivalent of a minister).

Whether the rationale of those cases can be extended to the copyright statute is an open question. It seems unlikely that the government action Congress envisioned in adopting RFRA included the protection of intellectual property rights against unauthorized appropriation. *Compare International Olympic Comm. v. San Francisco Arts & Athletics*, 781 F.2d 733, 737 (9th Cir. 1986) (enforcement of federally-granted trademarks is not state action). We need not decide this knotty question, however, for in the context of this case PCG has failed to demonstrate that the copyright laws subject it to a substantial burden in the exercise of its religion. *See United States v. Grant*, 117 F.3d 788, 792 n.6 (5th Cir. 1997) (declining to address constitutionality of RFRA as applied

to federal law because the government action at issue did not substantially burden the defendant's free exercise of religion). In its answer to the amended complaint, PCG admitted that it did not seek WCG's permission before copying *MOA*. This fact is confirmed by the certified minutes of the Advisory Council of Elders of the Church of God, submitted under the affidavit of the Secretary of the Church in support of WCG's motion for partial summary judgment, which states: "Prior to January, 1997, neither PCG, nor any of its agents, ever made an offer to purchase the copyrights of the *MOA*, or any of the Literary Works, nor did they request to purchase a license to exploit any rights therein, nor offered any royalties to do so."

A substantial burden "must be more than an inconvenience." *Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995) (quoting *Graham v. C.I.R.*, 822 F.2d 844, 850-51 (9th Cir. 1987) (internal citations omitted), *aff'd sub nom. Hernandez v. Commissioner*, 490 U.S. 680, 699 (1988)).

> [T]he religious adherent, . . . has the obligation to prove that a governmental regulatory mechanism burdens the adherent's practice of his or her religion by pressuring him or her to commit an act forbidden by the religion or by preventing him or her from engaging in conduct or having a religious experience which the faith mandates. This interference must be more than an inconvenience; *the burden must be substantial and an interference with a tenet or belief that is central to religious doctrine.*

Goehring, 94 F.3d at 1299 (citation omitted) (alteration and emphasis in the original). Having to ask for permission, and presumably to pay for the right to use an owner's copyrighted work may be an inconvenience, and perhaps costly, but it cannot be assumed to be as a matter of law a substantial burden on the exercise of religion. In the absence of evidence that PCG's needs could not reasonably be accommodated under the copyright laws, we decline to hold that enforcement of those laws in these circumstances constitutes an unreasonable burden.[3]

IV. CONCLUSION

The undisputed facts establish as a matter of law that PCG is not entitled to claim fair use. Because infringement by PCG of WCG's copyright is undisputed, barring fair use, WCG is entitled to a permanent injunction against the reproduction and distribution by PCG of *MOA*. Accordingly, we reverse the judgment for PCG in Nos. 99-55934 and 99-56489, and the denial of WCG's motion for a preliminary injunction in No. 99-55850, dismiss the appeal from the denial of WCG's motion for an injunction pending appeal in No. 99-56005 as moot, and remand for entry of a preliminary injunction pending a trial of any damages and final adjudication.

Costs on appeal to WCG.

SO ORDERED.

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3. Because we decide that PCG has not met RFRA's substantial burden test, we need not decide whether the Copyright Act is the least restrictive means of serving a compelling governmental interest. *See* 42 U.S.C. § 2000bb-1(b).

Appendix A

BRUNETTI, Circuit Judge, dissenting:

I respectfully dissent and disagree with the majority's reversal of the district court's ruling on fair use.

The copyright dispute in this case arises from a change in religious doctrine of the Worldwide Church of God ("WCG"). This doctrinal shift produced a splinter church, the Philadelphia Church of God ("PCG"). PCG, which was founded by "defrocked" WCG ministers in 1989, seeks to adhere to WCG's original religious doctrine as espoused by its former leader Herbert W. Armstrong. In particular, PCG views *Mystery of the Ages* ("*MOA*"), a book written by Armstrong, as a divinely inspired text necessary for proper interpretation of the Bible. It is required reading for every member baptized into the PCG church and any prospective member prior to their attendance at church services.

WCG, on the other hand, has renounced many of Armstrong's teachings since shortly after his death in 1986. Although it had previously distributed approximately 1.25 million copies of *MOA* in book form and 8 million copies in serial form, WCG ceased publication and distribution of *MOA* in 1988. WCG then destroyed all excess copies of *MOA* in its inventory, retaining only archival and research copies. WCG has not printed or distributed any copies of *MOA* since 1988 and has no plans for publication or distribution of the work as originally written.

WCG took this course of action, at least in part, because it believes that *MOA* contains historical, doctrinal and social errors. Armstrong's successor at WCG explained that WCG

has kept *MOA* out of print based on a "Christian duty" to keep Armstrong's doctrinal errors out of circulation. WCG has described *MOA* as "not in conformity with biblical teaching" and "racist." Although WCG claims that it plans to publish an annotated version of *MOA*, as of 1998, a decade after it ceased publishing *MOA*, testimony of WCG leaders demonstrates that the annotation of *MOA* is "not something that is going to be decided or happen any time soon." Apart from determining whether an annotation is financially feasible, WCG would need to take surveys of its membership, assess its priorities, determine the format, hire an author and researcher, and secure a publisher before any such annotation of *MOA* could be published.

PCG was founded because its ministers and members believe the religious doctrine espoused by Armstrong and as set forth in *MOA*. When WCG changed its church doctrine and renounced much of Armstrong's teachings, the founders and believers of PCG were forced from WCG as they could no longer practice their religious beliefs as set forth in *MOA*. It was WCG's doctrinal shift and renunciations that created the PCG and its need to publish *MOA*.

In light of these facts, this court must decide whether PCG's publication and distribution of *MOA* to church members and the public without charge beginning in January 1997 constitutes fair use of WCG's copyrighted work.

The fair use doctrine is an equitable rule of reason. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 448 & n.31 (1984). The statutory factors listed in 17 U.S.C. § 107 provide guidance in determining when the

fair use doctrine applies. However, there are no bright-line rules and "each case raising the [fair use] question must be decided on its own facts." *Id.* at 448 n.31 (quoting H.Rep. No. 94-1476). All four statutory factors "are to be explored, and the results weighed together, in light of the purposes of copyright." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

Here, PCG, a nonprofit organization, copied and distributed *MOA* free of charge to spread a religious message. PCG began publishing *MOA* because it was out of print and difficult to obtain through normal channels. It is undisputed that PCG did not solicit any funds in connection with its distribution of *MOA*. PCG's use stands in sharp contrast to other uses found to be commercial under the first statutory factor. *See Campbell*, 510 U.S. at 583-85 (parodic rap song sold to the public); *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 562 (1985) (magazine printed excerpts of soon-to-be published presidential memoir); *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1403 (9th Cir.), *cert. dismissed*, 118 S.Ct. 27 (1997) (book-length parody of O.J. Simpson murder trial written in style of Dr. Seuss and intended for public sale); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1152-53 (9th Cir. 1986) (magazine's parody of prominent minister mailed to minister's supporters together with letters soliciting donations and displayed on television as part of a fundraising drive).

Despite PCG's nonprofit status, its free-of-charge distribution of *MOA*, and the religious purpose behind such distribution, the majority concludes that the first statutory

factor militates against a finding of fair use because PCG's use is not transformative and PCG profits by using *MOA* as a marketing tool to attract new tithing members. As an initial matter, PCG's use need not be transformative to qualify as fair use. *Campbell*, 510 U.S. at 579. In this case, altering or adding to *MOA* would defeat PCG's religious purpose because it believes that *MOA* is a divinely inspired text. As to the profitability of PCG's use, WCG does not contest PCG's assertion that unsolicited donations in response to the distribution of *MOA* fail to come close to covering the enormous expense of printing *MOA*. WCG itself has stated that the costly production of *MOA* was one of the reasons it ceased publication. In my view, the noncommercial and religious elements of PCG's use overwhelm any commercial aspects and weigh in favor of fair use under the first statutory factor. Moreover, the fact that *MOA* had been out of print for nine years at the time of PCG's publication and could only be obtained through some libraries and used bookstores also supports a finding of fair use under the first factor. *See Harper & Row*, 471 U.S. at 553 ("A key, though not necessarily determinative factor in fair use is whether or not the work is available to the potential user. If the work is out of print and unavailable for purchase through normal channels, the user may have more justification for reproducing it . . . .") (quoting S.Rep. No. 94-473 (1975)); *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1264 n.8 (2d Cir. 1986) (out-of-print status of copyrighted book supports fair use determination).

The second and third statutory factors are mostly irrelevant to this case. For example, as a religious text, Armstrong's *MOA* defies easy classification under the second

factor as either informational or creative. *Compare New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 157 (2d Cir. 1990) ("the quoted works — which deal with [Scientology founder L. Ron] Hubbard's life, his views on religion, human relations, the Church, etc. — are more properly viewed as factual or informational") *and Religious Technology Center v. Netcom On-Line Com. Services, Inc.*, 923 F.Supp. 1231, 1246 (N.D. Cal. 1995) (policy letters of Hubbard Communication Office and works which are part of the methodology of "applied religious philosophy" are primarily functional or instructive, but other Hubbard works which appear more creative or original deserve greater fair use protection) *with Bridge Publications, Inc. v. Vien*, 827 F.Supp. 629, 635-36 (S.D. Cal. 1993) ("the undisputed evidence shows that L. Ron Hubbard's works are the product of his creative thought process, and not merely informational"). As to the amount of copying, even wholesale copying does not weigh against a finding of fair use under the third factor if it is consistent with the noncommercial purpose and character of the use. *Sony*, 464 U.S. at 449-50. In contrast to *Hustler* where the purposes of raising funds and rebutting derogatory information could have been served by less than wholesale copying of the parody, PCG's purpose in seeking to spread the religious message of Armstrong's divinely inspired text, like the nonprofit purpose of home videotaping in *Sony Corp.*, requires copying of the text as a whole. Accordingly, neither the second nor the third statutory factor militate against a finding of fair use.

Even though PCG's use is primarily noncommercial and religious, such use could not be considered fair use in light of the fourth and most important statutory factor if it impaired

the value or marketability of WCG's original *MOA* or its proposed annotated *MOA*. Yet, WCG has intentionally kept *MOA* out of circulation and made no reasonable effort to create an annotated version of *MOA* in the decade following its decision to cease publication. WCG originally distributed *MOA* free of charge as a way of spreading the religious message of its then current leader Armstrong. Like PCG, WCG used *MOA* as an educational and evangelical tool and may have obtained an indirect financial benefit by attracting tithing members. WCG's decision to cease publication of *MOA*, destroy inventory copies, and disavow *MOA*'s religious message in the context of its doctrinal shift as a church demonstrates that *MOA* is no longer of value to WCG for such purposes, regardless of PCG's actions. Because WCG has admitted that it has no plans to publish or distribute *MOA* as originally written, there can be no market interference.

Nor has WCG shown that "some meaningful likelihood of future harm exists" as to the potential market for WCG's planned publication of an annotated version of *MOA*. *See Sony Corp.*, 464 U.S. at 451. In *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), the court determined that publication of a book opposing abortion which used quotations from an earlier book tending to view abortion in a favorable light did not economically harm the earlier work. The court held that the plans for a second edition of the earlier work was not affected by the publication of the infringing work in part because "it is unthinkable that potential customers for a series of sympathetic interviews on abortion and adoption would withdraw their requests [for a second edition] because a small portion of the work was

used in an essay sharply critical of abortion." *Id.* at 1264. It continued by stating that "[t]his conclusion is supported by our finding that the two works served fundamentally different functions, by virtue both of their opposing viewpoints and disparate editorial formats." *Id.*

Here, as in *Maxtone-Graham*, the functions served by *MOA* and the proposed annotation as well as their potential markets are different. In contrast to PCG's evangelical use, the central purpose behind WCG's proposed annotated version of *MOA* is to identify Armstrong's historical, doctrinal, and social errors. The target markets for the two versions of *MOA* are different because it simply does not make sense for WCG to widely distribute an annotated *MOA* highlighting the errors of the original *MOA* to the general public in order to recruit new members. Unlike a publication which would provide a straight-forward explanation of WCG's religious doctrines for the purposes of recruitment, an annotated version of *MOA* would require a reader to become familiar with the text of the original *MOA* and then to read WCG's response to or criticism of Armstrong's religious views in order to discover WCG's doctrines. Indeed, because WCG hopes to use an annotated *MOA* to reach out to those familiar with Armstrong's teachings, PCG's use creates a larger potential market for an annotation rather than interfering with it. Moreover, the failure of WCG to make any reasonable progress on the annotation over the course of a decade as well as WCG's belief that it has a Christian duty to keep Armstrong's doctrinal errors out of circulation tends to undermine the credibility of WCG's intention to publish any such annotation.

Because there is no evidence, beyond the mere speculation by WCG's leaders, that PCG's use has a "demonstrable effect on the potential market for, or value of," *MOA* or WCG's proposed annotation, the use "need not be prohibited in order to protect the author's incentive to create." *Sony Corp.*, 464 U.S. at 450. The prohibition of PCG's noncommercial, religious use "would merely inhibit access to ideas without any countervailing benefit." *Id.* at 450-51. Accordingly, the fourth statutory factor also supports a finding of fair use.

In this lawsuit, WCG appears less interested in protecting its rights to exploit *MOA* than in suppressing Armstrong's ideas which now run counter to church doctrine. Although the Supreme Court has recognized that "freedom of thought and expression 'includes both the right to speak freely and the right to refrain from speaking at all,' " it does not "suggest that this right not to speak would sanction an abuse of the copyright owner's monopoly as an instrument to suppress facts." *Harper & Row*, 471 U.S. at 559.

In light of this principle and the statutory factors discussed above, I conclude that the district court did not err in granting partial summary judgment to PCG because it properly found that PCG's distribution of *MOA* constitutes fair use.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA ON COMPLAINT DATED AND FILED JULY 21, 1999 AND ENTERED JULY 23, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 97-5306-JSL

WORLDWIDE CHURCH OF GOD,

Plaintiff,

vs.

PHILADELPHIA CHURCH OF GOD, INC.,

Defendant.

JUDGMENT ON COMPLAINT

Judgment is hereby entered under Federal Rule of [Civil] Procedure 54(b) in favor of defendant Philadelphia Church of God, Inc. on plaintiff Worldwide Church of God's complaint herein, and plaintiff shall take nothing by way of its complaint. [The taxation of costs] matter will be considered upon renewed motion in September or later.

Dated: 7/21/99

s/ Spencer Letts
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER AND JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION DATED AND FILED APRIL 15, 1999 AND ENTERED APRIL 20, 1999

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CV 97-5306 JSL

WORLDWIDE CHURCH OF GOD,

Plaintiff,

v.

PHILADELPHIA CHURCH OF GOD,

Defendant.

ORDER AND JUDGMENT DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION FOR PRELIMINARY INJUNCTION AND GRANTING DEFENDANT'S MOTION FOR SUMMARY ADJUDICATION

On February 8, 1999, the following motions (the "Motions") in the above-captioned case came on for hearing before the court:

Appendix C

1. Motion of plaintiff and counter-defendant Worldwide Church of God ("WCG") for partial summary judgment;

2. Motion of defendant and counter-claimant Philadelphia Church of God ("PCG") for summary adjudication;

3. Motion of WCG for preliminary injunction.

The court having considered the parties' written submissions and argument of counsel on the Motions, and good cause appearing therefor, enters the following Findings of Uncontroverted Fact, Conclusions of Law, and Order. To the extent that any Findings of Uncontroverted Fact are included under Conclusions of Law, they shall be deemed Findings of Uncontroverted Fact; and to the extent that any Conclusions of Law are included under Findings of Uncontroverted Fact, they shall be deemed Conclusions of Law.

FINDINGS OF FACT

1. Herbert W. Armstrong founded the Radio Church of God, later renamed the Worldwide Church of God ("WCG"), in or about 1934. The WCG was incorporated in California in 1947. Armstrong served as Pastor General of the WCG, or its functional equivalent, from the time it was founded until his death in 1986.

2. While he was alive, Armstrong had the unilateral power to appoint and remove at will members of the WCG's Board of Directors and members of the Boards of Directors of all WCG-affiliated entities.

Appendix C

3. Armstrong unilaterally amended the WCG's Bylaws and designated his own successor as Pastor General of the WCG.

4. While Armstrong was alive, the WCG's Bylaws provided that Armstrong was the only individual required to be a member of the WCG's Board of Directors.

5. *Mystery of the Ages* ("MOA"), Armstrong's final written work, was published in 1986 as a religious work. During Armstrong's lifetime, MOA was considered by the WCG to be a religious work that expressed the religious doctrine of the WCG.

6. The WCG did not have the right to control Armstrong's work, including his authorship of MOA.

7. Following Armstrong's death, the leaders of the WCG disavowed MOA as a religious work, and continue to do so.

8. The WCG has stopped publishing and/or distributing MOA.

9. The WCG has discarded inventory copies of MOA.

10. The Philadelphia Church of God ("PCG") was established by two former WCG ministers.

11. The PCG continues to regard MOA as a religious work that must be used in its entirety, as Armstrong wrote it.

Appendix C

12. In relationship to the demand for MOA for use as a religious work, the number of pre-existing copies of MOA publicly available is *de minimis*.

13. The dwindling supply of copies of MOA has hindered the PCG's efforts to practice its religion.

14. Prior to January 1997, WCG refused requests from members of the WCG for permission to reprint MOA.

15. In January 1997, the PCG started to print and distribute, at its own expense, duplicate copies of MOA as it existed when Armstrong first published the book.

16. The PCG has provided copies of MOA free of charge and unconditionally to those who have requested the book.

17. To date, the PCG has spent in excess of a quarter of a million dollars printing and distributing MOA.

18. The PCG does not send solicitations for tithes or other donations along with requested copies of MOA.

19. The PCG does not follow up with later solicitations directed at those who request and receive free copies of MOA.

20. The WCG has no plans to print or use MOA as originally published.

21. Although the WCG has indicated that it might publish an "annotated" MOA in the future, the WCG has

not contracted with or otherwise arranged to have anyone write the "annotated" MOA.

CONCLUSIONS OF LAW

1. MOA was not a "work made for hire" within the meaning of Section 101 of the Copyright Act because Herbert W. Armstrong, not the WCG, had the right to control the manner and means by which the writing of MOA was accomplished. *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751, 109 S. Ct. 2166 (1989).

2. Armstrong was the "author" of MOA, as that term is used in the Copyright Act.

3. To the extent that Armstrong had an "employment relationship" with the WCG, he did not write MOA in the course of any such relationship.

4. The fact that the WCG did not consent to the PCG's use of MOA does not bar the PCG from asserting that its use of MOA is a "fair use" of the work. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585, n. 18, 114 S. Ct. 1164 (1994).

5. The PCG uses MOA for non-profit religious and educational purposes.

6. The amount of copying involved in the PCG's use of MOA does not preclude a finding of fair use. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1155 (9th Cir. 1986).

7. Because the PCG continues to regard MOA as a religious work that must be used as a complete text, the amount of text copied by the PCG is reasonable in relation to that use. *Campbell*, 510 U.S. at 586-87; *Hustler Magazine*, 796 F.2d at 1153-55.

8. There is no evidence that the PCG's distribution of MOA has resulted in the "loss" of any members or prospective members to the WCG.

9. There is no evidence that the PCG's distribution of MOA has caused any cognizable harm to the WCG.

10. The version of MOA distributed by the PCG and the WCG's proposed "annotated" MOA would not in any sense "compete" in the same market.

11. Because MOA is out of print and the WCG refuses to publish it, the PCG has "more justification for producing" the work. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555, 105 S. Ct. 2218 (1985).

12. In addition to the statutory "fair use" factors set forth in 17 U.S.C. § 107, other equitable factors, including MOA's publication as a religious work and the WCG's attempts to prevent further publication or distribution of MOA, support a finding that the PCG's use of MOA is a statutorily protected "fair use" of the work.

13. The PCG's use of MOA is a statutorily protected "fair use" of the work. 17 U.S.C. § 107.

Appendix C

ORDER AND JUDGMENT

1. The Motion of the WCG for Partial Summary Judgment is DENIED.

2. The Motion of the PCG for Summary Adjudication is GRANTED, and it is hereby ordered that:

a. The PCG is entitled to judgment on the WCG's complaint;

b. The PCG is entitled to judgment on its counterclaim, insofar as the counterclaim raises the question of the PCG's fair use of the work, *Mystery of the Ages*;

c. The court expressly determines pursuant to Federal Rule of Civil Procedure 54(b) that there is no just reason for delay in the entry of judgment in favor of the PCG on the WCG's complaint and the PCG's counterclaim, insofar as the counterclaim raises the question of the PCG's fair use of the work *Mystery of the Ages*.

3. In addition, pursuant to 28 U.S.C. § 1292(b), the court expressly certifies that the court's orders in this case involve controlling questions of law as to which there is substantial ground for difference of opinion, and that an immediate appeal may materially advance the ultimate termination of this litigation.

4. The WCG's Motion for Preliminary Injunction is DENIED.

Appendix C

5. The previously scheduled trial date is vacated and further discovery in this action is stayed pending resolution of any appeals from the court's orders.

IT IS SO ORDERED AND ADJUDGED.

DATED: 4/15/99

s/ Spencer Letts
J. Spencer Letts
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR PANEL REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED AND FILED NOVEMBER 9, 2000

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 99-55850, 99-55934,
99-56005, 99-56489

D.C. No. CV-97-05306-JSL

WORLDWIDE CHURCH OF GOD,
a California Corporation,

Plaintiff/Counter-Defendant –
Appellant,

v.

PHILADELPHIA CHURCH OF GOD, INC.,
an Oklahoma Corporation,

Defendant/Counter-Claimant –
Appellee.

ORDER

BEFORE: BRUNETTI and TASHIMA, Circuit Judges, SCHWARZER,* Senior District Judge.

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* The Honorable William W. Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

Appendix D

Judges Tashima and Schwarzer have voted to deny the petition for panel rehearing and Judge Brunetti to grant it. Judge Tashima votes to deny the petition for rehearing en banc and Judge Schwarzer so recommends. Judge Brunetti recommends that the petition for rehearing en banc be granted. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.